UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

UPMC AND ITS SUBSIDIARY UPMC PRESBYTERIAN SHADYSIDE, SINGLE EMPLOYER, d/b/a UPMC PRESBYTERIAN HOSPITAL AND d/b/a UPMC SHADYSIDE HOSPITAL	**Cases:**	**06-CA-102465** **06-CA-102494** **06-CA-102516** **06-CA-102518** **06-CA-102525** **06-CA-102534** **06-CA-102540** **06-CA-102542**
and		**06-CA-102544** **06-CA-102555** **06-CA-102559** **06-CA-102566**
SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC		**06-CA-104090** **06-CA-104104** **06-CA-106636** **06-CA-107127** **06-CA-107431** **06-CA-107532** **06-CA-107896** **06-CA-108547** **06-CA-111578** **06-CA-115826**

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDMENTS ADDING UPMC AS AN ADDITIONAL RESPONDENT

I. INTRODUCTION

In April 2013, the SEIU Healthcare Pennsylvania ("the Union") filed several charges against UPMC Presbyterian Shadyside d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital ("UPMC Presbyterian Shadyside") and UPMC. UPMC is a legal holding company that includes independent entities (both for profit and not for profit) with twenty hospitals other than UPMC Presbyterian Shadyside. The charges alleged that UPMC Presbyterian Shadyside and UPMC were a single employer. After months of investigation and

taking evidence, Region 6 found that UPMC was not a necessary party and that the Union's single employer allegations had no relevance to this proceeding. Accordingly, in September 2013, the Region determined that there was no basis to proceed against UPMC. The Union filed amended charges (per the Region's instruction) that were identical to the original charges, except UPMC was dropped as a charged party. The proceedings against UPMC ended.

On September 30, 2013, the Region issued its Consolidated Complaint against only UPMC Presbyterian Shadyside. All alleged unfair labor practices were alleged to have been committed solely by employees of UPMC Presbyterian Shadyside. All locations set forth in the Consolidated Complaint are owned or operated by UPMC Presbyterian Shadyside. Lastly, all of the relief requested was sought only against UPMC Presbyterian Shadyside.

The hearing was initially set for December 16, 2013 and later set for February 3, 2014. However, the Region recently issued an Amended Consolidated Complaint that UPMC received on January 10, 2014. The only relevant substantive changes included in the Amended Consolidated Complaint were the additional allegations naming UPMC as a respondent and raising the Union's single employer theory. There are no allegations, however, that UPMC Presbyterian Shadyside, a substantially capitalized entity, is incapable of remedying any of the alleged unfair labor practices; nor are there any allegations that the two entities have engaged in any schemes or artifices to thwart the enforcement of the National Labor Relations Act ("the Act"). The Amended Consolidated Complaint simply makes conclusory allegations that UPMC and UPMC Presbyterian Shadyside constitute a single integrated enterprise.

Because (a) the Amended Consolidated Complaint is time-barred insofar as paragraphs 2(a), 3(a) 3(b), 4(a), 4(b) and 5(a) are concerned, (b) UPMC and UPMC Presbyterian Shadyside were denied due process, and (c) the amendment to add UPMC as a respondent does not advance

the purposes of the Act, and for the reasons that follow, UPMC and UPMC Presbyterian Shadyside now move to dismiss the complaint amendments adding UPMC as a respondent.

II. FACTUAL BACKGROUND

In April 2013, the Union filed numerous charges against UPMC Presbyterian Shadyside and its holding company UPMC. These charges alleged various violations of the Act, including that UPMC Presbyterian Shadyside and its holding company UPMC constituted a "single employer."

Throughout the investigation of these charges, counsel for UPMC Presbyterian Shadyside and its holding company disputed that the two entities constituted a single employer. The Regional Director for Region 6 was presented with overwhelming evidence that the holding company, UPMC, which does not employ any employees, could not be a charged party because it had not participated in any respect in any of the alleged unfair labor practices. After a thorough evaluation of the facts, Region 6, in September 2013, rejected the Union's single employer theories and determined that UPMC should not be a part of these proceedings. The Region's conclusion was confirmed when in that same month the Union filed amended charges, the obvious and only impact of which was the removal of UPMC as a named employer and the stripping of any single employer theory from this case. Region 6 thereafter issued a Consolidated Complaint on September 30, 2013. The Consolidated Complaint did not list the holding company UPMC as a respondent and did not include any single employer allegations. Indeed, Region 6 did not even serve a copy of the Consolidated Complaint on the holding company UPMC.

Since that time all parties understood that UPMC was out of the case. UPMC Presbyterian Shadyside's preparation for the hearing, which was initially set for December 16,

2013 (now set for February 3, 2014 after two postponements), therefore, did not address any of the complex legal and factual issues associated with its relationship to UPMC and the question of single employer status. Instead, UPMC Presbyterian Shadyside focused its hearing preparation on the over 50 separate allegations of unfair labor practices contained in the Consolidated Complaint.

Notwithstanding Region 6's initial conclusions concerning the role of UPMC in this protracted litigation, it has now made an abrupt U-turn. Based on a recently articulated General Counsel "policy," and more than three months after it issued the Consolidated Complaint and only *three weeks before the hearing*, the Region has issued an Amended Consolidated Complaint (received by UPMC and UPMC Presbyterian Shadyside on January 10, 2014) that makes allegations of single employer status between UPMC and UPMC Presbyterian Shadyside. Thus, Region 6 has inserted into this litigation, only three weeks before the hearing, the complex legal and factual issues associated with determining single employer status.

To date, UPMC and UPMC Presbyterian Shadyside have received no explanation as to why or how Region 6 could release UPMC as a charged party in September 2013 (along with all single employer allegations), only to change course three months later and re-insert UPMC into the case as a respondent without any additional fact-gathering and without any opportunity for UPMC or UPMC Presbyterian Shadyside to respond.

In all other material respects, the Amended Consolidated Complaint is identical to the Consolidated Complaint. In other words, the Amended Consolidated Complaint still alleges unfair labor practices against UPMC Presbyterian Shadyside, references facilities owned or operated only by UPMC Presbyterian Shadyside, and implicates managers, supervisors, agents and employees of only UPMC Presbyterian Shadyside.

Since the amendments are untimely, violate the due process rights of both UPMC and UPMC Presbyterian Shadyside, and do not advance the purposes of the Act, and for the reasons that follow, the Amended Consolidated Complaint and specifically the allegations set forth in Paragraphs 2(a), 3(a), 3(b), 4(a), 4(b) and 5(a) must be dismissed.

III. ANALYSIS

A. The Addition of UPMC as a Respondent in the Amended Consolidated Complaint is Time-Barred by Section 10(b) of the Act

The allegations against UPMC included in the Amended Consolidated Complaint are time-barred by Section 10(b) of the Act. Section 10(b) provides that no complaint may issue on matters which occurred more than six months prior to the filing of a charge. Here, almost all of the original charges naming UPMC were filed before July 2013.[1] Region 6 released UPMC from all charges in September 2013 when it instructed the Union to file amended charges that included the same substantive allegations but dropped UPMC as a respondent and dropped the single employer allegations. At that point (*i.e.,* September 2013), UPMC had been removed from these proceedings and it was no longer a party.

After being removed from these proceedings through the charge amendments in September 2013, the Region decided (for reasons unbeknownst to UPMC or UPMC Presbyterian Shadyside) to reinstitute the proceedings against UPMC on January 10, 2014 when it simultaneously served amended charges and the Amended Consolidated Complaint. But the charges implicating UPMC were originally filed more than six months prior to January 10, 2014 and involve allegations that occurred more than six months prior to the date these amended charges were filed. Because UPMC was dismissed as a party altogether and entirely removed

[1] Two charges – 06-CA-111578 and 06-CA-115826 – were filed after July 2013.

from these proceedings, any notion that the amended charges against UPMC served on January 10, 2014 could "relate back" to the original timely charges is unsustainable.

The Region's decision in September 2013 to dismiss UPMC from all charges marked a clear demarcation in these proceedings – from that point on, the Region was only pursuing charges against UPMC Presbyterian Shadyside. UPMC did not remain involved in any capacity. As of September 2013, the charges and allegations against UPMC ceased to exist. The Board's reasoning in *Ducane Heating Corp.*, 273 NLRB 1389 (1985), *overruled on other grounds by IAM District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991), where the Board found that a reinstated charge was outside Section 10(b)'s limitations period, is directly on point:

> We hold today that a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) . . . .
>
> We find . . . that the General Counsel must exercise his discretion in conformity with the limitations proviso created by Congress. We note that the General Counsel's authority is to be exercised "on behalf of the Board," and we find that we would exceed our own authority were we to permit the General Counsel to ignore the statutory limitations proviso.
>
> Further, we find this standard must apply regardless of whether the charge was withdrawn *or* dismissed. We see no substantive distinction between a withdrawn and a dismissed charge. In either event, the charge has been disposed of and, in effect, ceases to exist. **Moreover, it seems to us that the dismissal of a charge by a government official well versed in the intricacies of labor law creates the impression on members of the public that the charge has been disposed of even more conclusively than is the case when it is merely withdrawn.**

Ducane, 273 NLRB at 1390 (internal citations omitted) (emphasis added).

No different result can be reached here. The Union's first amended charges dropped UPMC as a charged party, which effectively functioned as the equivalent of a withdrawn or dismissed charge. Accordingly, under the rationale of *Ducane*, the amended charges filed against UPMC on January 10, 2014 cannot relate back to any original timely filed charge.

This analysis is supported by *Redd-I, Inc.*, 209 NLRB 1115 (1988), and its progeny. There, the Board explicitly stated that "*Ducane* [does not apply] here, because [that] case [did not] involve an attempt to add closely related allegations to a pending charge. Rather, [*Ducane*] involved an attempt to reinstate the dead allegations themselves without reference to any other pending timely charge." *Redd-I*, 209 NLRB at 1116. That is what occurred here. The allegations against UPMC were dead when UPMC was released as a party in September 2013 – there are no pending timely charges against UPMC that the amended charges or Amended Consolidated Complaint filed on January 10, 2014 could relate back to.

But even if *Redd-I* applied on the instant facts, the test set forth therein demonstrates there can be no relation back. The Board in *Redd-I* announced a three-pronged test:

> First, we shall look at whether the otherwise untimely allegations are of the same class . . . . This means that the allegations must all involve the same legal theory and usually the same section of the Act. . . . Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events . . . . This means that the allegations must involve similar conduct, usually during the same time period with a similar object. . . . Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations . . . .

Redd-I, 209 NLRB at 1118. *See also Canned Foods, Inc.*, 332 NLRB 1449, 1458 (2000).

First, the single employer allegation implicating UPMC raises an entirely different legal theory than the alleged violations of Sections 8(a)(1-4) of the Act (implicating only UPMC Presbyterian Shadyside) that remained following UPMC's removal from the charges in September 2013. Second, the single employer allegation arises from a different factual situation and sequence of events, namely the alleged co-mingling between UPMC and UPMC Presbyterian Shadyside that could lead to a finding of a single employer enterprise (*e.g.*, common ownership, common control of labor relations, common management and interchange

of operations). The facts pertaining to the alleged violations of Section 8(a) by UPMC Presbyterian have no connection to the single employer analysis. Third, the defenses to the single employer allegation are wholly distinct from the defenses to the claims made in the Amended Consolidated Complaint under Section 8(a).

The Board confirmed this analysis in *Canned Foods*, where it held that the untimely charge, which raised the single employer issue, could not relate back to Section 8(a)(1) and 8(a)(3) allegations "because such involves a different legal theory and defenses . . . ." *Canned Foods*, 332 NLRB at 1458-59.Consequently, the amended charges and Amended Consolidated Complaint served on January 10, 2014 are time-barred under Section 10(b) of the Act to the extent UPMC is named as a respondent.

B. UPMC and UPMC Presbyterian Shadyside Have Been Denied Due Process by the General Counsel's Tardy Application of the Single Employer Theory to This Case

The addition of UPMC in the Amended Consolidated Complaint denies both UPMC and UPMC Presbyterian Shadyside their due process rights as guaranteed by the United States Constitution. The Administrative Procedure Act codifies this requirement: "Persons entitled to notice of an agency hearing shall be **timely** informed of . . . the matters of fact and law asserted." 5 U.S.C. § 554(b)(3) (emphasis added).

"The test of due process in this setting is a determination of fair notice . . . [where] the crucial focus is at all times on whether notice was given which provided the party with an adequate opportunity to prepare and present its evidence. . . . The test of due process in these circumstances remains one of fairness under the circumstances of each case . . . ." *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 546 (7th Cir. 1987) (internal citations omitted). *See also Russell-Newman Mfg. Co. v. NLRB*, 370 F.2d 980, 984 (5th Cir. 1967) ("Due process in an

administrative hearing includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. Administrative convenience or necessity cannot override this requirement."). The court in *NLRB v. Complas Industries, Inc.*, 714 F.2d 729 (7th Cir. 1983) expounded further:

> [A]dequacy of notice is an essential prerequisite to fair and effective adjudication. Due process requires that before the government can take enforcement action against persons charged with unlawful conduct, it must inform such persons of the basis of the complaint and give them a meaningful opportunity to meet the complaint. . . .
>
> **The amending of the complaint . . . did not involve a minor variation from the claim in the original complaint for which respondent prepared a defense.** . . . Due process is not satisfied by giving respondent a mere opportunity to question witnesses without a prior opportunity to prepare a meaningful defense. We do not believe that the amended claim was fairly tried since the company was not given a meaningful opportunity to preserve relevant evidence, prepare for, and present a meaningful defense to the unlawful interrogation claim.

Complas, 714 F.2d at 733-34 (emphasis added).

Here, as of September 2013, when Region 6 informed the holding company that it was no longer a charged party, UPMC's involvement in these proceedings ended. The charges were amended and the Consolidated Complaint issued – none of which were served on UPMC or implicated it any fashion.

The hearing date was first set for December 16, 2013 and later set for February 3, 2014, and UPMC Presbyterian Shadyside has spent months preparing its defenses to the allegations contained in the Consolidated Complaint, which did not include any issues related to UPMC or to single employer status. Only three weeks before the hearing, the Counsel for the General Counsel amended the Consolidated Complaint naming UPMC as a respondent and alleging that it and UPMC Presbyterian Shadyside are a single integrated enterprise. The only explanation for this abrupt change has been a passing reference from Counsel to the General Counsel to a

"policy" of inclusion of the parent corporation – a policy that apparently did not exist or was not deemed important in September 2013.

UPMC is now forced to prepare an entire case in response to all of the allegations (not just the single employer issue) for the hearing in three weeks. Yet it has no idea why it was truly brought back into these proceedings. Similarly, UPMC Presbyterian Shadyside is now forced to change the course of its preparation. And facing the substantial, complex, and entirely different factual and legal considerations implicated by a single employer allegation, both entities have been forced to tread blindly, as the evidence they had initially proffered convinced the Region that whether the entities were or were not a single employer was irrelevant to this proceeding. But now that same evidence is being used to argue the exact opposite conclusion by the Counsel for the General Counsel.

This sequence of events defines the denial of due process, where the emphasis (at least in the context of Board proceedings) lies in fair notice and an understanding of the allegations being brought against an employer. "Failure to clearly define the issues and advise an employer charged with a violation of the law . . . is, of course, to deny procedural due process of the law." *NLRB v. I.W.G., Inc.*, 144 F.3d 685, 688-89 (10th Cir. 1998) (internal citations omitted). Not only has the Region failed to clearly define the issues (its flip-flopping would leave any employer guessing), it leaves UPMC and UPMC Presbyterian Shadyside only three weeks to figure it out.

The court's reasoning in *NLRB v. Pepsi-Bottling Company*, 613 F.2d 267 (10th Cir. 1980), is instructive:

> This is not a case of a minor variation from the charge in the complaint. . . .
>
> Many labor dispute cases involve multiple charges based on a variety of occurrences. This case was complex and confusing . . . . Simply because

> violations could have been alleged in addition to those in the complaint does not obligate the employer to defend against all possibilities.

Pepsi-Bottling, 613 F.2d at 273-74.

Even before the Amended Consolidated Complaint issued and the complex single employer allegation resurfaced, the Consolidated Complaint consisted of twenty separate charges alleging as many as fifty distinct unfair labor practices. To say the least, UPMC Presbyterian Shadyside had its hands full with the Consolidated Complaint. Neither it nor the holding company UPMC could have anticipated or predicted that the Region would reverse course *sua sponte* and bring in complex and substantial questions of law and fact only three weeks prior to the hearing. The Board's position that due process is denied when the General Counsel "lull[s] Respondent into thinking that it did not need to defend the charge" is squarely at odds with what the Counsel for the General Counsel is now attempting to do. *El Paso Healthcare System, LTD.*, 358 NLRB No. 54, *3 (2012).

The denial of due process is also epitomized by the Region's decision *during the investigative phase* to remove the holding company UPMC from these proceedings because the Union's single employer allegations lacked any relevance to this proceeding, only to reverse that decision *after the investigative phase,* after the Consolidated Complaint issued, and after the hearing date was set. The court's recent decision in *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012) supports the position of UPMC and UPMC Presbyterian Shadyside:

> [W]hile [an agency] may seek relief on behalf of individuals beyond the charging parties and for alleged wrongdoing beyond those originally charged, it must discover such individuals and wrongdoing *during the course of its investigation*. . . .
>
> In summary, while we recognize that [an agency] enjoys significant latitude to investigate claims, and to allege claims in federal court based on the results of its investigations, we find a clear and important distinction between

> facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed [complaint].

CRST, 679 F.3d at 674-75 (internal citations omitted) (emphasis in original).

Here, ***during the course of its investigation***, Region 6 concluded that the holding company UPMC should not be subject to a complaint because there was no relevance to the single employer allegations in this proceeding. Thus, the Region found ***during the course of its investigation*** that UPMC was not a proper respondent herein. Under *CRST*, the Region's subsequent reversal (after its investigation and after the Consolidated Complaint issued) denied due process to UPMC and UPMC Presbyterian Shadyside.

For this reason and all of those expressed in this Section III(B), the Amended Consolidated Complaint should be dismissed to the extent it added UPMC as a respondent (and raised the corresponding single employer allegation) because the Region denied due process to both UPMC and UPMC Presbyterian Shadyside.

C. Adding Holding Company UPMC as a Respondent Does Not Advance the Purposes of the Act

Whatever the reason or motivation behind Region 6 adding the holding company UPMC as a respondent in the Amended Consolidated Complaint, at least one thing is clear from the face of the Amended Consolidated Complaint itself: including UPMC as a respondent does not advance the purposes of the Act. Other than the addition of UPMC as a respondent and the corresponding single employer allegation, the remainder of the Amended Consolidated Complaint is identical to the Consolidated Complaint, where UPMC does not appear in any fashion. The Amended Consolidated Complaint still alleges unfair labor practices against only UPMC Presbyterian Shadyside, references facilities owned or operated only by UPMC Presbyterian Shadyside, and implicates managers, supervisors, agents and employees of only

UPMC Presbyterian Shadyside. Even more telling, the remedies requested in the Amended Consolidated Complaint do not reference the holding company UPMC; rather, the remedies only implicate UPMC Presbyterian Shadyside.

The Region has not and cannot explain how including UPMC as a respondent advances the purposes of the Act in any fashion. At all relevant times, UPMC Presbyterian Shadyside has made clear it is fully capable of satisfying any potential remedy sought, and the Region has never questioned this nor is there any reason to do so. UPMC Presbyterian Shadyside by itself is one of the larger hospital systems in the country and can satisfy any remedial order that could arise from these proceedings. UPMC simply does not belong in this case, precisely as the Region found back in September 2013 during its investigation upon weighing all the evidence and arguments. Nothing has changed since then, and neither the affected employees, the Union, the General Counsel nor the Board are set to gain anything by UPMC's inclusion. Without the possibility of advancing any purpose under the Act, UPMC should not have been added as a respondent in the Amended Consolidated Complaint.

IV. CONCLUSION

For the reasons addressed above, UPMC and UPMC Presbyterian Shadyside respectively move for the dismissal of all single employer allegations and of UPMC as a respondent in these cases. The hearing date is set for February 3, 2014, and UPMC Presbyterian Shadyside is prepared to go forward on that date and respond to the allegations included in the Consolidated Complaint (issued back on September 30, 2013). Neither UPMC nor UPMC Presbyterian Shadyside should have to litigate and defend themselves at this late juncture against issues related to their alleged single employer status, where the litigation of such a complex issue is

barred by Section 10(b) of the Act, prejudices their due process rights, and does not advance or effectuate the purposes and policies of the Act.

Respectfully submitted,

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Dated: January 27, 2014

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the within Supporting Memorandum has been served by First Class U.S. Mail on all parties listed below this 27th day of January, 2014:

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